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Krishnasamy a/l Kuppusamy & Anor v Pengarah Hospital Sultanah Aminah & Ors and other appeals

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-01(IM)(NCVC)-113–03 OF 2022, J-01(IM)(NCVC)-114–03 OF 2022 AND J-01(IM)(NCVC)-115–03 OF 2022
LEE SWEE SENG, MARIANA YAHYA AND WONG KIAN KHEONG JJCA
C
2 NOVEMBER 2023

Civil Procedure — Striking out — Appeal against order allowing striking out — Suits against Government in relation to fire incident occurred in Sultanah Aminah Hospital, Johor Bahru — High Court struck out plaintiffs' suits on grounds that suits were instituted after expiry of three-year limitation period provided under s 2(a) of Public Authorities Protection Act 1948 ('PAPA') — Plaintiffs filed appeals — Plaintiffs filed applications for leave of Court of Appeal to adduce affidavit of public officer — Whether Federal Government may be estopped by statements made by public officer from relying on the three-year limitation period provided in s 2(a) of the PAPA — Whether public officer's affidavit was not available during hearing of striking out applications — Whether public officer's affidavit would have been likely to have 'determining influence' on High Court's decisions pursuant to r 7(3A) of Rules of the Court of Appeal 1994 — Whether applications for leave of Court of Appeal to adduce affidavit of public officer ought to be allowed — Whether there was triable issue – Whether suits were frivolous, vexatious or abuse of court's process — Whether plaintiffs ought to be allowed to amend statements of claim — Courts of Judicature Act 1964 s 69(2) — Limitation Act 1953 — Public Authorities Protection Act 1948 s 2(a) — Rules of Court 2012 O 1A, O 2 r 1(2), O 18 r 19(1)(b),(d), O 41 r 5(1),(2) & O 92 r 4 — Rules of the Court of Appeal 1994 rr 4 & 7(2), (3A)(a), (b)

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The plaintiffs were the parents and dependents of three out of six patients who had passed away ('the six deceased persons') in a fire incident occurred in the
H Intensive Care Unit of Sultanah Aminah Hospital, Johor Bahru ('the hospital') on 25 October 2016. The first defendant was the hospital's director, the second defendant was the Johore State Health Director, the third defendant was the Director-General of the Ministry of Health ('the MOH'), and the fourth defendant was the Government of Malaysia. The plaintiffs filed three suits
I against the defendants ('the three suits'), but the said suits were struck out by the judicial commissioner ('the JC') because the suits were instituted after the expiry of the three-year limitation period (pursuant to s 2(a) of the Public Authorities Protection Act 1948 ('the PAPA')) on 25 October 2019. The plaintiffs then filed three appeals against the JC's decision. In these appeals, the

plaintiffs filed three notices of motion for leave of the Court of Appeal to adduce an affidavit affirmed on 5 April 2023 by Dr Selahuddeen bin Abdul Aziz ('Dr Selahuddeen'), the former Johore State Health Director who served from February 2018 until October 2019 ('the leave applications'). It ought to be noted that between February 2018 and October 2019, Dr Selahuddeen and the former hospital's director known as Dr Aman had met the family members of the six deceased persons ('the meetings') and informed them that the report of the 'Independent Inquiry Committee' ('the IIC') in relation to the fire incident was not ready and the question of compensating them would only be considered by the fourth defendant after the completion of the IIC's report ('Dr Selahuddeen/Dr Aman's statements'). In this regard, the minutes of the meetings were prepared by MOH. The defendants had opposed the leave applications on the grounds that: (a) the contents of Dr Selahuddeen's affidavit constituted hearsay evidence and were not admissible in the three appeals pursuant to O 41 r 5(1) of the Rules of Court 2012 ('the ROC'); and (b) the contents of Dr Selahuddeen's affidavit did not concern the three-year limitation period and would not have a 'determining influence' on the three High Court's decisions within the meaning of r 7(3A)(b) of the Rules of the Court of Appeal 1994 ('the RCA'). The issue arose in these appeals was whether the Federal Government may be estopped by statements made by, among others, Johore State Health Director from relying on the three-year limitation period provided in s 2(a) of the PAPA.

Held, allowing the three appeals:

(1) The RCA was silent regarding the use of affidavits for the hearing of appeals in the Court of Appeal. Consequently, r 4 of the RCA stated that the ROC 'shall apply mutatis mutandis' with regard to the question of whether the Court of Appeal could consider the contents of Dr Selahuddeen's affidavit in these three appeals. If the said affidavit was admissible as 'further evidence' in these appeals, then the contents of this affidavit may be considered by the Court of Appeal. In this regard, the defendants' striking out applications were 'interlocutory proceedings' within the meaning of O 41 r 5(2) of the ROC and the three appeals emanated from the said striking out applications. Consequently, premised on the decision in the case of *Tokai Corporation v DKSH Malaysia Sdn Bhd* [2016] MLJU 621, the court may apply O 41 r 5(2) of the ROC read with r 4 of the RCA to consider the contents of Dr Selahuddeen's affidavit in these three appeals (see paras 17–18).

(2) Pursuant to the second part of s 69(2) of the Courts of Judicature Act 1964 ('the CJA') and the second part of r 7(2) of the RCA, leave of the Court of Appeal was not required in relation to the further evidence which was intended to be relied on by an applicant in the hearing of an appeal in the Court of Appeal but the said further evidence only came into being after the hearing in the High Court or the subordinate court.

As such, there was no leave required for the plaintiffs to use Dr Selahuddeen's affidavit in these three appeals (see paras 20 & 25–26).

(3) Rule 7(3A) of the RCA only allowed 'further evidence' to be admitted at the 'hearing of the appeal' if the following two conditions were satisfied cumulatively by the applicant: (a) the first condition — the further evidence was not available to the applicant at the hearing in the High Court or subordinate court ('the first alternative limb (first condition)'), or the further evidence existed at the hearing in the High Court or subordinate court but was not available to the applicant despite the exercise of reasonable diligence by the applicant ('the second alternative limb (first condition)'); and (b) the second condition — the further evidence, if true, would have had a determining influence upon the decision of the High Court or subordinate court ('first alternative limb (second condition)'), or the further evidence, if true, would have been likely to have a determining influence upon the decision of the High Court or subordinate court ('second alternative limb (second condition)') (see para 21).

(4) The court found that the plaintiffs had satisfied the two conditions under r 7(3A) of the RCA. The first alternative limb (first condition) was fulfilled because Dr Selahuddeen's affidavit was not available to the plaintiff during the hearing of the defendants' applications for striking out. The second alternative limb (second condition) was established considering that the contents of Dr Selahuddeen's affidavit would have been likely to have a determining influence on the three High Court's decisions. Premised on the above reasons, the leave applications were allowed by the court without any order as to costs (see para 27).

(5) The court was of the view that a public officer ('X'), and the Federal Government, State Government or public authority ('the Government/Public Authority') who was vicariously liable for X's act, omission and/or conduct may be estopped by any statement and/or conduct by X, a public officer other than X, and/or the Government/Public Authority from relying on the three-year limitation period under s 2(a) of the PAPA. This decision was supported by the following reasons: (a) the three-year limitation period was a procedural defence and not a substantive one; (b) the High Court's decision in the case of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202, and the Federal Court's decision in the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 had recognised the application of the doctrine of equitable estoppel to bar a party's reliance on a limitation defence pursuant to the Limitation Act 1953, as such, there was no reason in principle and policy why such doctrine could not be invoked against public officers and/or Government/Public Authority in respect of the

three-year limitation period; and (c) in accordance with good public governance, public officers and Government/Public Authority should not make statements and/or conduct themselves in a manner which may cause any person to be irreparably prejudiced (see paras 32–33).

(6) The court found that there was a triable issue regarding whether the defendants were estopped by Dr Selahuddeen/Dr Aman's statements ('the statements') from relying on the three-year limitation period. This triable issue was supported by the following evidence and reasons: (a) the plaintiffs knew about the formation of the IIC and its inquiry; (b) at the time of making the statements, Dr Selahuddeen and Dr Aman held high office in MOH; (c) the statements were made in the meetings and the minutes of the meetings were prepared by MOH which clearly showed that the statements were made in the course of employment of Dr Selahuddeen and Dr Aman and were not made off-the-cuff without any intention by the defendants to be bound by the statements; and (d) the plaintiffs did not file the three suits within the three-year limitation period because the plaintiffs had relied on the statements. Consequently, the contents of Dr Selahuddeen's affidavit would have been likely to have a 'determining influence' on the three High Court's decisions within the meaning of the second alternative limb (second condition) of r 7(3A) of the RCA (see paras 34–35).

(7) In view of the triable issue, it was not plain and obvious case for the High Court to strike out the three suits. Further, the court found that the three suits were neither frivolous nor vexatious within the meaning of O 18 r 19(1)(b) of the ROC, and the three suits did not constitute abuse of process as understood in O 18 r 19(1)(d) and O 92 r 4 of the ROC (see para 36).

(8) In view of the statements and the triable issue, it was only just for the court to grant leave under O 18 r 19(1) read with O 1A and O 2 r 1(2) of the ROC for the plaintiffs to amend their statements of claim ('the SOCs') so as to include a pleading that the defendants were estopped by Dr Selahuddeen/Dr Aman's statements from relying on the three-year limitation period ('the estoppel pleading'). No injustice occasioned to the defendants by allowing the plaintiffs to amend the SOCs because: (a) the defendants were entitled to amend their defence in the three suits with regard to the estoppel pleading; and (b) irrespective of the estoppel pleading, the defendants were at liberty to defend themselves at the trial of the three suits as they see fit (see para 40).

(9) In allowing the appeals, the court made the following orders: (a) the three High Court's decisions were set aside; (b) the three suits were remitted to the High Court to be tried before another judge or JC; (c) leave was granted to the three plaintiffs to amend their SOCs to include the estoppel pleading within 14 days from the date of the order of the court

(with leave to the defendants to amend their defence in the three suits in response to the amended SOCs); and (d) costs of the three appeals and the defendants' striking out applications shall follow the event of the trial of the three suits (see para 41).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan ibu bapa dan tanggungan kepada tiga daripada enam pesakit yang telah meninggal dunia ('enam orang yang meninggal dunia') dalam kejadian kebakaran yang berlaku di Unit Rawatan Rapi Hospital Sultanah Aminah, Johor Bahru ('hospital') pada 25 Oktober 2016. Defendan pertama ialah pengarah hospital, defendan kedua ialah Pengarah Kesihatan Negeri Johor, defendan ketiga ialah Ketua Pengarah Kesihatan, Kementerian Kesihatan Malaysia ('MOH'), dan defendan keempat ialah Kerajaan Malaysia. Plaintif-plaintif memfailkan tiga saman terhadap defendan-defendan ('tiga saman tersebut'), tetapi saman-saman tersebut telah dibatalkan oleh pesuruhjaya kehakiman ('PK') kerana saman-saman tersebut dimulakan selepas tamat tempoh had masa tiga tahun (berdasarkan kepada s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('APPBA')) pada 25 Oktober 2019. Plaintif-plaintif kemudian memfailkan tiga rayuan terhadap keputusan PK. Dalam rayuan-rayuan ini, plaintif-plaintif memfailkan tiga notis usul bagi mendapatkan kebenaran Mahkamah Rayuan untuk mengemukakan afidavit yang disahkan pada 5 April 2023 oleh Dr Selahuddeen bin Abdul Aziz ('Dr Selahuddeen'), bekas Pengarah Kesihatan Negeri Johor yang berkhidmat mulai Februari 2018 hingga Oktober 2019 ('permohonan-permohonan kebenaran tersebut'). Perlu diingat bahawa antara Februari 2018 dan Oktober 2019, Dr Selahuddeen dan bekas pengarah hospital yang dikenali sebagai Dr Aman telah menemui ahli keluarga enam orang yang meninggal dunia tersebut ('pertemuan tersebut') dan memaklumkan kepada mereka bahawa laporan 'Independent Inquiry Committee' ('IIC') berhubung insiden kebakaran tersebut belum disiapkan dan soal pampasan kepada mereka hanya akan dipertimbangkan oleh defendan keempat selepas laporan IIC tersebut disiapkan ('kenyataan Dr Selahuddeen/Dr Aman'). Sehubungan itu, minit pertemuan tersebut telah disediakan oleh MOH. Defendan-defendan telah menentang permohonan-permohonan kebenaran tersebut atas alasan-alasan bahawa: (a) kandungan afidavit Dr Selahuddeen merupakan keterangan dengar cakap dan tidak boleh diterima dalam tiga rayuan tersebut menurut A 41 k 5(1) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'); dan (b) kandungan afidavit Dr Selahuddeen tidak melibatkan tempoh had masa tiga tahun tersebut dan tidak akan mempunyai 'pengaruh penentu' ke atas tiga keputusan Mahkamah Tinggi mengikut pengertian k 7(3A)(b) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KKMR 1994'). Isu yang timbul dalam rayuan ini adalah sama ada Kerajaan Persekutuan boleh dihalang oleh kenyataan yang dibuat oleh, antara lain, Pengarah Kesihatan Negeri Johor daripada bergantung kepada tempoh had masa tiga tahun yang diperuntukkan dalam s 2(a) APPBA.

Diputuskan, membenarkan ketiga-tiga rayuan:

(1) Kaedah-Kaedah Mahkamah Rayuan 1994 tidak memperuntukkan berhubung penggunaan afidavit untuk pendengaran rayuan di Mahkamah Rayuan. Akibatnya, k 4 KKMR 1994 menyatakan bahawa KKM 2012 'hendaklah terpakai mutatis mutandis' berkenaan dengan persoalan sama ada Mahkamah Rayuan boleh mempertimbangkan kandungan afidavit Dr Selahuddeen dalam ketiga-tiga rayuan ini. Jika afidavit tersebut boleh diterima sebagai 'keterangan lanjut' dalam rayuan-rayuan ini, maka kandungan afidavit ini boleh dipertimbangkan oleh Mahkamah Rayuan. Dalam hal ini, permohonan-permohonan pembatalan oleh defendan-defendan adalah 'prosiding interlokutori' dalam pengertian A 41 k 5(2) KKM 2012 dan ketiga-tiga rayuan ini terhasil daripada permohonan-permohonan pembatalan tersebut. Oleh itu, berdasarkan keputusan dalam kes *Tokai Corporation v DKSH Malaysia Sdn Bhd* [2016] MLJU 621, mahkamah boleh mengguna pakai A 41 k 5(2) KKM 2012 yang dibaca bersama k 4 KKMR 1994 untuk mempertimbangkan kandungan afidavit Dr Selahuddeen dalam ketiga-tiga rayuan ini (lihat perenggan 17–18).

(2) Menurut bahagian kedua s 69(2) Akta Mahkamah Kehakiman 1964 ('AMK') dan bahagian kedua k 7(2) KKMR 1994, kebenaran Mahkamah Rayuan tidak diperlukan berhubung dengan keterangan lanjut yang bertujuan untuk disandarkan oleh pemohon dalam pendengaran rayuan di Mahkamah Rayuan tetapi keterangan lanjut tersebut hanya wujud selepas perbicaraan di Mahkamah Tinggi atau mahkamah bawahan. Oleh itu, tiada kebenaran diperlukan untuk plaintif menggunakan afidavit Dr Selahuddeen dalam ketiga-tiga rayuan ini (lihat perenggan 20 & 25–26).

(3) Kaedah 7(3A) KKMR 1994 hanya membenarkan 'keterangan lanjut' diterima pada 'pendengaran rayuan' jika dua syarat berikut telah dipenuhi secara kumulatif oleh pemohon: (a) syarat pertama — keterangan lanjut tersebut tidak tersedia kepada pemohon pada perbicaraan di Mahkamah Tinggi atau mahkamah bawahan ('bahagian alternatif pertama (syarat pertama)'), atau keterangan lanjut tersebut wujud pada perbicaraan di Mahkamah Tinggi atau mahkamah bawahan tetapi tidak tersedia kepada pemohon walaupun pemohon telah melakukan usaha yang munasabah ('bahagian alternatif kedua (syarat pertama)'); dan (b) syarat kedua — keterangan lanjut tersebut, jika benar, akan mempunyai pengaruh penentu ke atas keputusan Mahkamah Tinggi atau mahkamah bawahan ('bahagian alternatif pertama (syarat kedua)'), atau keterangan lanjut tersebut, jika benar, berkemungkinan mempunyai pengaruh penentu ke atas keputusan Mahkamah Tinggi atau mahkamah bawahan ('bahagian alternatif kedua (syarat kedua)') (lihat perenggan 21).

(4) Mahkamah mendapati plaintif-plaintif telah memenuhi dua syarat di bawah k 7(3A) KKMR 1994. Bahagian alternatif pertama (syarat pertama) telah dipenuhi kerana afidavit Dr Selahuddeen tidak tersedia kepada plaintif-plaintif semasa pendengaran permohonan-permohonan pembatalan tersebut oleh defendan-defendan. Bahagian alternatif kedua (syarat kedua) telah dibuktikan memandangkan kandungan afidavit Dr Selahuddeen berkemungkinan mempunyai pengaruh penentu ke atas ketiga-tiga keputusan Mahkamah Tinggi tersebut. Berdasarkan alasan-alasan di atas, permohonan-permohonan kebenaran tersebut dibenarkan oleh mahkamah tanpa apa-apa perintah mengenai kos (lihat perenggan 27).

(5) Mahkamah berpendapat bahawa pegawai awam ('X'), dan Kerajaan Persekutuan, Kerajaan Negeri atau pihak berkuasa awam ('Kerajaan/Pihak Berkuasa Awam') yang bertanggungjawab secara vikarius bagi tindakan, peninggalan dan/atau kelakuan X boleh dihalang oleh apa-apa kenyataan dan/atau kelakuan oleh X, pegawai awam selain X, dan/atau Kerajaan/Pihak Berkuasa Awam daripada bergantung pada tempoh had masa tiga tahun di bawah s 2(a) APPBA. Keputusan ini disokong oleh sebab-sebab berikut: (a) tempoh had masa tiga tahun tersebut adalah pembelaan prosedural dan bukan pembelaan substantif; (b) keputusan Mahkamah Tinggi dalam kes *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202, dan keputusan Mahkamah Persekutuan dalam kes *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 telah mengiktiraf penggunaan doktrin estoppel saksama untuk menghalang pergantungan sesuatu pihak pada pembelaan had masa menurut Akta Had Masa 1953, oleh itu, tidak ada sebab pada prinsip dan dasar mengapa doktrin tersebut tidak boleh digunakan terhadap pegawai awam dan/atau Kerajaan/Pihak Berkuasa Awam berkenaan dengan tempoh had masa tiga tahun tersebut; dan (c) mengikut tadbir urus awam yang baik, pegawai awam dan Kerajaan/Pihak Berkuasa Awam tidak seharusnya membuat kenyataan dan/atau berkelakuan dengan cara yang boleh menyebabkan mana-mana orang diprejudiskan dengan teruk (lihat perenggan 32–33).

(6) Mahkamah mendapati terdapat isu yang boleh dibicarakan berkenaan sama ada defendan-defendan dihalang oleh kenyataan Dr Selahuddeen/Dr Aman ('kenyataan tersebut') daripada bergantung kepada tempoh had masa tiga tahun tersebut. Isu yang boleh dibicarakan ini disokong oleh keterangan-keterangan dan alasan-alasan berikut: (a) plaintif-plaintif mengetahui tentang pembentukan IIC dan siasatannya; (b) semasa membuat kenyataan tersebut, Dr Selahuddeen dan Dr Aman memegang jawatan tinggi di MOH; (c) kenyataan tersebut telah dibuat dalam pertemuan tersebut dan minit pertemuan tersebut telah disediakan oleh MOH yang jelas menunjukkan bahawa kenyataan

tersebut dibuat dalam tempoh perkerjaan Dr Selahuddeen dan Dr Aman dan tidak dibuat begitu sahaja tanpa apa-apa niat untuk defendan-defendan terikat dengan kenyataan tersebut; dan (d) plaintif-plaintif tidak memfailkan ketiga-tiga saman tersebut dalam tempoh had masa tiga tahun tersebut kerana plaintif-plaintif telah bergantung pada kenyataan tersebut. Akibatnya, kandungan afidavit Dr Selahuddeen berkemungkinan mempunyai 'pengaruh penentu' ke atas ketiga-tiga keputusan Mahkamah Tinggi tersebut mengikut pengertian bahagian alternatif kedua (syarat kedua) k 7(3A) KKMR 1994 (lihat perenggan 34 & 35).

(7) Mengambil kira isu yang boleh dibicarakan tersebut, ia bukanlah kes yang jelas dan terang bagi Mahkamah Tinggi untuk membatalkan ketiga-tiga saman tersebut. Selanjutnya, mahkamah mendapati bahawa ketiga-tiga saman tersebut tidak remeh dan tidak menyusahkan dalam pengertian A 18 k 19(1)(b) KKM 2012, dan ketiga-tiga saman tersebut bukan merupakan penyalahgunaan proses seperti yang difahami dalam A 18 k 19(1)(d) dan A 92 k 4 KKM 2012 (lihat perenggan 36).

(8) Mengambil kira kenyataan dan isu yang boleh dibicarakan tersebut, hanyalah adil untuk mahkamah memberikan kebenaran di bawah A 18 k 19(1) yang dibaca bersama A 1A dan A 2 k 1(2) KKM 2012 untuk plaintif-plaintif meminda penyata tuntutan mereka ('PT') untuk memasukkan pliding bahawa defendan-defendan telah dihalang oleh kenyataan Dr Selahuddeen/Dr Aman daripada bergantung pada tempoh had masa tiga tahun tersebut ('pliding estoppel'). Tiada ketidakadilan berlaku kepada defendan-defendan dengan membenarkan plaintif-plaintif meminda PT kerana: (a) defendan-defendan berhak meminda pembelaan mereka dalam tiga saman tersebut berkenaan dengan pliding estoppel tersebut; dan (b) tanpa mengira pliding estoppel tersebut, defendan-defendan bebas untuk membela diri semasa perbicaraan ketiga-tiga saman tersebut sebagaimana yang mereka fikirkan patut (lihat perenggan 40).

(9) Dalam membenarkan rayuan-rayuan tersebut, mahkamah membuat perintah-perintah berikut: (a) ketiga-tiga keputusan Mahkamah Tinggi tersebut diketepikan; (b) ketiga-tiga saman tersebut dikembalikan ke Mahkamah Tinggi untuk dibicarakan di hadapan hakim atau PK yang lain; (c) kebenaran telah diberikan kepada ketiga-tiga plaintif untuk meminda PT mereka untuk memasukkan pliding estoppel tersebut dalam tempoh 14 hari dari tarikh perintah mahkamah (dengan kebenaran kepada defendan-defendan untuk meminda pembelaan mereka dalam tiga saman tersebut sebagai tindak balas kepada pindaan PT tersebut); dan (d) kos bagi ketiga-tiga rayuan dan permohonan-permohonan pembatalan defendan-defendan hendaklah

mengikut keadaan perbicaraan ketiga-tiga saman tersebut (lihat perenggan 41).]

Cases referred to

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202, HC (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Datuk (Datu) Amir Kahar bin Tun Haji Mustapha v Tun Mohd Said bin Keruak & Ors [1994] 3 MLJ 737, HC (refd)
Kerajaan Malaysia v PKNS Engineering & Construction Bhd [2019] MLJU 1880, HC (refd)
Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar [2020] 1 MLJ 141; [2020] 1 CLJ 1, FC (refd)
Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan [2005] 1 MLJ 515, CA (refd)
Tokai Corporation v DKSH Malaysia Sdn Bhd [2016] MLJU 621, HC (refd)
Yap Chee Keong Holdings Sdn Bhd v Cosmopolitan Avenue Sdn Bhd [2022] MLJU 139; [2022] 3 CLJ 764, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 17, 69, 69(1), (2), (3)
Interpretation Acts 1948 and 1967 ss 2(1)(e), 23(1), Part I
Limitation Act 1953
Public Authorities Protection Act 1948 s 2(a)
Revision of Laws Act 1968
Rules of Court 2012 O 1A, O 2 r 1(2), O 18 rr 19(1), (1)(b), O 41 rr 5, 5(1), (2), O 92 r 4
Rules of the Court of Appeal 1994 rr 4, 7, 7(1), (2), (3), (3A), (3A)(a), (3A)(b)

Appeal from: *Krishnasamy a/l Kuppusamy & Anor v Pengarah Hospital Sultanah Aminah Johor Bahru & Ors and other cases* [2022] MLJU 552 (High Court, Johor Bahru)

S Gunasegaran (with Tan Po Au) (Zaman & Assoc) for the appellants.
Zahilah bt Mohammad Yusoff (with Syazana bt Abdul Lajis) (Senior Federal Counsel, Johore State Legal Advisor's Office) for the respondents.

Wong Kian Kheong JCA:

A. INTRODUCTION

[1] The above three appeals ('three appeals') raise a novel question of whether the Federal Government ('fourth defendant') may be estopped by statements made by, among others, Johore State HealthDirector ('second defendant') from relying on the three year limitation period ('three year limitation period') provided in s 2(a) of the Public Authorities Protection Act 1948 ('the PAPA').

B. BACKGROUND

[2] We shall refer to parties as they were in the High Court ('HC').

[3] A fire broke out on 25 October 2016 ('fire') in the Intensive Care Unit ('ICU') of Sultanah Aminah Hospital, Johore Bahru ('hospital').

[4] Six patients in the hospital's ICU perished in the fire ('six deceased persons').

[5] The plaintiffs ('plaintiffs') in the above three suits ('three suits') are the parents and dependents of three out of the six deceased persons.

[6] The first defendant is the hospital's Director while the third defendant is the Director-General of the Ministry of Health ('MOH'). This judgment shall refer to all the defendants collectively in these three appeals as the 'defendants'.

[7] After the fire, MOH formed a seven-member 'independent inquiry committee' to inquire into the cause of the fire and to make the necessary recommendations to the fourth defendant ('IIC'). The IIC was headed by a retired judge of Court of Appeal ('JCA'), Dato' Seri Mohd Hishamudin bin Mohd Yunus.

[8] In June 2018, IIC handed its report ('IIC's report') to MOH. Until the date of this written judgment, IIC's report has not been released to the public.

C. LEGAL PROCEEDINGS

C(1) Three suits

[9] The plaintiffs filed the three suits in the HC on 2 September 2020.

[10] The defendants filed three applications to strike out the three suits on the ground that the three suits had been instituted after the expiry of the three year limitation period on 25 October 2019 ('defendants' three striking out applications').

[11] On 15 February 2022 the learned judicial commissioner ('JC') in the HC allowed the defendants' three striking out applications with costs of RM2,500 to the defendants for each of the three suits ('three HC decisions'). The plaintiffs have filed the three appeals to the Court of Appeal ('CA') against the three HC decisions.

[12] The plaintiffs have applied to CA and obtained an order for these three appeals to be heard together ('joint hearing (three appeals)').

C(2) Joint hearing (three appeals)

[13] For the purpose of the joint hearing ('three appeals'), the plaintiffs filed three notices of motion for leave of CA to adduce an affidavit affirmed on 5 April 2023 by Dr Selahuddeen bin Abdul Aziz ('Dr Selahuddeen') for the purpose of the hearing of these three appeals ('plaintiffs' three leave applications (Dr Selahuddeen's affidavit)').

[14] Dr Selahuddeen's affidavit stated as follows, among others:

(1) Dr Selahuddeen was Johore State Health Director from February 2018 until October 2019;

(2) between February 2018 and October 2019, Dr Selahuddeen (as the then Johore State Health Director) met with family members of the six deceased persons (including the plaintiffs) ('family members (six deceased persons)') with Dr Aman bin Rabu (Dr Aman) (the hospital's Director at that time) ('meetings'). At the meetings:

(a) Dr Selahuddeen provided updates to the family members (six deceased persons) regarding the status of IIC's inquiry;

(b) Dr Selahuddeen and Dr Aman had informed the family members (six deceased persons) that IIC's report was not ready andthe question of compensating the family members (six deceased persons) would only be considered by the fourth defendant after the completion of IIC's report ('statements (Dr Selahuddeen/Dr Aman)'); and

(c) minutes of the meetings were prepared by MOH ('minutes (meetings)') but Dr Selahuddeen did not have access to the minutes (meetings) as he had retired from public service in October 2019;

(3) before Dr Selahuddeen's retirement, he attended a MOH meeting chaired by the then Minister of Health and was informed of the following matters:

(a) the IIC's report had been prepared and submitted to MOH; and

(b) the IIC's report could not be released to the public because the Cabinet had yet to approve its release; and

(4) Dr Selahuddeen could not inform the family members (six deceased persons) that the IIC's report had been prepared because he had already retired.

C(3) Defendants' objections to plaintiffs' three leave application (Dr Selahuddeen's affidavit)

[15] We reproduce below the relevant parts of s 69 of the Courts of Judicature Act 1964 ('the CJA'), r 7 of the Rules of the Court of Appeal 1994 ('the RCA') and O 41 r 5 of the Rules of Court 2012 ('the RC'):

Section 69 CJA *Hearing of appeals*

(1) *Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers* and duties, as to amendment or otherwise, *of the High Court, together with full discretionary power to receive further evidence* by oral examination in court or through a remote communication technology, *by affidavit*, or by deposition taken before an examiner or commissioner.

(2) *The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought*.

(3) *Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal*.

Rule 7 RCA *Power of Court to* amend, *admit further evidence*, or draw inferences of fact

(1) *The Court shall have all the powers* and duties, as to amendment or otherwise, *of the appropriate High Court, together with full discretionary power to receive further evidence* by oral examination in Court, *by affidavit*, or by deposition taken before an examiner or Commissioner.

(2) *Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought*.

(3) *Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall be*

admitted on special grounds only, and not without leave of the Court.

(3A) *At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that —*

(a) *at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and*

(b) *the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.*

Order 41 r 5 RC *Contents of affidavit*

(1) *Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.*

(2) *An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds hereof.* (Emphasis added.)

[16] The learned senior federal counsel (who represented the defendants in these three appeals) has opposed the plaintiffs' three leave applications (Dr Selahuddeen's affidavit) on the following two grounds:

(1) the contents of Dr Selahuddeen's affidavit constituted hearsay evidence and were not admissible in the three appeals according to O 41 r 5(1) of the RC; and

(2) even if Dr Selahuddeen's affidavit did not contain hearsay evidence, the court should not allow the plaintiffs to use Dr Selahuddeen's affidavit in the three appeals. This is because the contents of Dr Selahuddeen's affidavit did not concern the three year limitation period and would not have a 'determining influence' on the three HC decisions within the meaning of r 7(3A)(b) of the RCA.

OUR DECISION

D. WHETHER O 41 R 5(1) OF THE RC BARS ADMISSION OF DR SELAHUDDEEN'S AFFIDAVIT

[17] RCA are silent regarding use of affidavits for the hearing of appeals in CA. Consequently, r 4 of the RCA provides that RC 'shall apply mutatis mutandis' with regard to the question of whether CA can take into account the contents of Dr Selahuddeen's affidavit in these three appeals.

[18] If Dr Selahuddeen's affidavit is admissible as 'further evidence' in the three appeals (please refer to Parts E and F below), we are of the view that the

contents of Dr Selahuddeen's affidavit may be considered by the CA. The following reasons support this decision:

(1) in *Tokai Corporation v DKSH Malaysia Sdn Bhd* [2016] MLJU 621, at [16(2)], the HC has explained the scope of O 41 r 5(1) and (2) of the RC as follows:

> [16(2)] ... *Order 41 rule 5(1) of the RC provides that an affidavit may contain only such facts as the deponent of the affidavit is able of his or her own knowledge to prove. In the Singapore High Court case of Wong Hong Toy & Anor v Public Prosecutor [1988] 2 MLJ 553, at p 557, Lai Kew Chai J held that O 41 r 5(1) of the then Singapore's Rules of the Supreme Court 1970 [RSC (Singapore)] 'enshrines the evidentiary rule against the admission of hearsay evidence'. Order 41 r 5 of the RSC (Singapore) is similar to our O 41 r 5 of the RC.*
>
> *Order 41 r 5(1) and (2) of the RC provide four exceptions wherein an affidavit may contain hearsay evidence, namely when there is an application of the following*:
>
> (a) O 14 r 2(2) of the RC;
>
> (b) O 14 r 4(2) of the RC;
>
> (c) *O 41 r 5(2) of the RC*; and
>
> (d) a court order has been made under O 38 r 3(1) of the RC. (Emphasis added.)

(2) the defendants' three striking out applications are 'interlocutory proceedings' within the meaning of O 41 r 5(2) of the RC. These three appeals emanate from the defendants' three striking out applications. Consequently, premised on *Tokai Corporation*, we may apply O 41 r 5(2) of the RC read with r 4 of the RCA to take into account the contents of Dr Selahuddeen's affidavit in these three appeals. We further rely on the following judgments in the HC:

(a) in *Datuk (Datu) Amir Kahar bin Tun Haji Mustapha v Tun Mohd Said bin Keruak & Ors* [1994] 3 MLJ 737, to determine an application to strike out a suit, Abdul Kadir Sulaiman J (as he then was) had admitted an affidavit pursuant to O 41 r 5(2) of the RC. According to *Datuk Amir Kahar*, at p 741 to 742:

> *The defendants' application is under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('the RHC') and under the inherent jurisdiction of the court. The application is supported by the affidavit of Wong Kian Kheong affirmed on 7 September 1994. The said affidavit merely refers to various affidavits-in-reply of the defendants filed as replies to the plaintiff's main application in the originating summons. Based on those affidavits-in-reply, the deponent verily believes that the originating summons of the plaintiff discloses no reasonable cause of action against all or any of the defendants, and/or is scandalous, frivolous, vexatious and/or is an abuse of the process of the court. In opposition to this application of the*

defendants, the plaintiff filed an affidavit in opposition affirmed on 22 September 1994. In the affidavit in opposition of the plaintiff, he questioned the propriety of those affidavits-in-reply referred to by the deponent of the affidavit in support of this application, since those affidavits are meant for the trial/hearing of the originating summons which had been fixed for hearing. So, the immediate issue which calls for a decision is whether the application of the defendant is defective in the light of the nature of the affidavit in support. … Order 18 r 19 does not spell out the requirement of any affidavit in support of the application. This is different from an application made under O 14 where, by r 2(1) thereof, the application must be made by summons supported by an affidavit. Similarly with an application under O 81, where by r 2(1) thereof, an affidavit is required for the application. Again, an application under O 49 r 2 is required to be supported by an affidavit. Similarly with an application under O 50 r 3, where the application must be supported by an affidavit. To cite yet another form of application is an application under O 29 r 1(2) of the RHC which must be supported by an affidavit, whereas under O 18 r 19, it merely requires an application to be made. There is no requirement in the rule of an affidavit accompanying the application. *An application by summons-in-chambers is no doubt an interlocutory proceeding and O 41 r 5(2) mentions an affidavit sworn for the purpose of being used in interlocutory proceedings. But in the absence of any express requirement of an affidavit to support the application in O 18 r 19, it is my view that for an application under the rule, the affidavit in support of the application is not mandatory. In the circumstances, the affidavit of Wong Kian Kheong in support of this application of the defendants is of no consequence or significance. In any event, if I am wrong in holding that an affidavit is not a prerequisite for an application under O 18 r 19, then according to O 41 r 5(2), an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof. In that light, the affidavit of Wong Kian Kheong in this case is not defective because after a reference to those affidavits, he deposed that based on the aforesaid affidavits, he verily believes that the originating summons of the plaintiff discloses no reasonable cause of action against all or any of the defendants and/or is scandalous, frivolous, vexatious and/or is an abuse of the process of court. … In the circumstances, the plaintiff's objection has no merit*. (Emphasis added.)

(b) the above judgment in Datuk Amir Kahar has been applied in *Kerajaan Malaysia v PKNS Engineering & Construction Bhd* [2019] MLJU 1880, at [9].

E. WHEN CAN 'FURTHER EVIDENCE' BE ADMITTED IN THE CA?

[19] Firstly, 'further evidence' in s 69(1) to (3) of the CJA, r 7(1), (2), (3) and (3A) of the RCA ('relevant statutory provisions') means evidence which had not been adduced in the HC or subordinate court ('HC/subordinate court').

[20] Secondly, three categories of 'further evidence' can be identified in the relevant statutory provisions, namely:

(1) 'further evidence' which is intended to be used by an applicant (applicant) in interlocutory applications in the CA ('further evidence (interlocutory CA application)');

(2) 'further evidence' which is intended to be relied on by an applicant in the hearing of an appeal in the CA ('further evidence (appeal)') but the further evidence (appeal) only came into being after the hearing in the HC/subordinate court (subsequent evidence); and

(3) further evidence (appeal) was available to the applicant at the time of the hearing in the HC/subordinate court but was not adduced in the HC/subordinate court ('existent evidence').

[21] Rule 7(3A) of the RCA only allows 'further evidence' to be admitted at the 'hearing of the appeal' if the following two conditions are satisfied cumulatively by the applicant ('two conditions (r 7(3A))'):

(1) the first of the two conditions (r 7(3A)) ('first condition (r 7(3A))') is provided in r 7(3A)(a) of the RC and has two alternative limbs, namely:

   (a) the 'further evidence' was not available to the applicant at the hearing in the HC/subordinate court ('first alternative limb (first condition)'). The first alternative limb (first condition) concerns subsequent evidence; or

   (b) the 'further evidence' existed at the hearing in the HC/subordinate court but was not available to the applicant despite the exercise of reasonable diligence by the applicant ('second alternative limb (first condition)'). The second alternative limb (first condition) refers to existent evidence; and

(2) r 7(3A)(b) of the RC provides for the second of the two conditions (r 7(3A)) ('second condition (r 7(3A))'). There are two alternative limbs of the second condition (r 7(3A)), namely, the 'further evidence', if true:

   (a) would have had a determining influence upon the decision of the HC/subordinate court ('first alternative limb (second condition)'); or

   (b) would have been likely to have a determining influence upon the decision of the HC/subordinate court ('second alternative limb (second condition)').

[22] Rule 7(3A) of the RCA only applies to further evidence (appeal) and not to further evidence (interlocutory CA application). Accordingly, the first part of s 69(2) of the CJA and the first part of r 7(2) of the RCA allow an applicant

to use further evidence (interlocutory CA application) without any leave of CA.

[23] It is clear that r 7(3A) of the RCA applies to existent evidence and an applicant can only discharge the burden to persuade the CA to grant leave to admit the existent evidence at the hearing of the appeal in CA if the two conditions (r 7(3A)) are satisfied cumulatively.

[24] The question that arises is whether r 7(3A) of the RCA applies to subsequent evidence. In the CA case of *Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515:

(1) Mokhtar Sidin JCA delivered the 2–1 majority decision ('majority judgment (*Sin Heap Lee-Marubeni*)') as follows, at [10] to [12] and [15] to [18]:

> [10] *In order for the application to be allowed the appellant had to satisfy the conditions as stated in para (3A). There is no doubt in my mind that what the appellant attempted to produce was a happening after the facts* ...
>
> [11] *As I have stated earlier, the appellant conceded that the evidence intended to be adduced did not occur before the trial or during the trial. It occurred long after the trial in the High Court had been concluded. It is clear to me that the evidence intended to be adduced was in respect of an occurrence long after the incident and after the trial. This evidence was the availability of an alternative access road to the respondent's land long after the trial (almost ten years after the respondent had filed the present action). It is clear to me that evidence was not only not available at the trial but also non-existent* ...
>
> [12] *The second test as stated by para (3A) is that the new evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the High Court* ...
>
> ...
>
> [15] *It is clear from the above that the fresh evidence that the appellant intended to adduce further was on the assumption that the ground level of the land would be brought down but there was no evidence that that was so. This assumption was based on the fact that there were some earthworks on the respondent's land and the adjoining land. With those earthworks, the appellant assumed that the respondent's land could be entered from the other neighbouring adjoining lot which was to be developed some ten years after the respondent had filed this action. In my view, those facts have nothing to do with the damages suffered by the respondent. To find an alternative road to his land was the respondent's only option to make the optimum use of his land after the original access road had been destroyed.*
>
> [16] *The appellant in their affidavit in reply affirmed by Ch'ng Cheah Chean on 19 July 2003 confirmed, my view that the application to adduce fresh evidence was only to make an assumption* and assertion as stated at para 4(d): ...

[17] *In my view, this is not evidence at all but only an assumption which the appellant could submit during the trial. In my view, there is no fresh evidence in the application at all.*

[18] *In my view, the application did not satisfy the conditions imposed by r 7 of the RCA. For that reason, by majority decision, we dismissed the application by the appellant.* (Emphasis added.)

(2) Abdul Aziz Mohamad JCA (as he then was) delivered the following dissenting judgment ('dissenting judgment (*Sin Heap Lee-Marubeni*)'), at [73] to [83]:

[73] *The appellants applied, by a notice of motion, for leave, 'in the event that leave is necessary', to adduce further evidence in their appeal. The further evidence was as to a matter that occurred after the date of the decision of the High Court in this case, namely, evidence of extensive earthworks that were being carried out on the respondent's land that, it was claimed, would bring down the 'platform levels' of the land. The main purpose of the evidence was to prove that there would no longer be any need to construct a retaining wall to stabilize the slope of the respondent's land or, even if a retaining wall was still required, that its cost would be greatly reduced 'due to loss of land surcharge (weight of soil)', so that the compensatory damages would now not be as much as the RM3.6 million that was awarded.*

[74] *The respondent opposed the application. In his affidavit he contended, among other things, that the recent earthworks did not affect the height and configuration of the slope, that it is not permissible to ask the appellate court to reassess damages that have been properly assessed at the trial and that, in any event, the evidence failed to satisfy the three conditions for its reception. I understood the three conditions to be those that may be drawn from (r 7(3A) of the RCA).*

[75] *We heard the application before commencing to hear the appeal. It was dismissed by a majority decision without hearing learned counsel for the respondent. I was of the view, after hearing the submission of the appellants' learned counsel and not having the opportunity to hear the submission of the respondent's learned counsel, that the application should be allowed. I proceed to state my reasons.*

[76] *The question of the giving and reception of further evidence for civil appeals to the Court of Appeal is dealt with in s 69 of the CJA* ...

[77] *It is clear from sub-s (2) that if the further evidence is as to matters which have occurred after the decision appealed from, it may be given 'in any case'. No leave is required. The giving of further evidence as to post-decision matters is a matter of right. It is also clear from the words 'save as to matters subsequent as aforesaid' in sub-s (3) that the requirements of special grounds and of leave laid down by the sub-s do not apply to post-decision matters.*

[78] *Except for the words 'Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals' in sub-s (1), the whole of s 69, all the five sub-sections of it, were, with very slight immaterial differences, reproduced in*

r 7 of the RCA, the five sub-sections becoming the five paras of the rule in the same order. The effect of r 7 was of course the same as that of s 69. As far as post-decision matters are concerned, the giving of further evidence is a matter of right.

[79] *Now a provision of an Act of Parliament ought not be re-enacted in subsidiary legislation, because the re-enactment will be merely an echo that has no existence, life or force of its own. Remove it, and the law is still there in the Act. Further, if the re-enactment is with modification, the modification is ultra vires and ineffective because it seeks to make modification in the law through subsidiary legislation in an area that Parliament has enacted for, unless the power to modify is expressly given by Parliament. The modification will inevitably have effects that are inconsistent with or repugnant to the provision as enacted by Parliament, and subsidiary legislation is incapable of doing that.*

[80] *I have to say all that because in 1998 r 7 was amended by introducing the following para (3A)*: ...

...

[81] *That is the paragraph that I mentioned earlier in connection with the three conditions to be satisfied. It imposes restrictions where none existed before. Further, the requirement in para (b) that the new evidence would have had or would have been likely to have had a determining influence on the decision that was made, read with para (a), would suggest that further evidence would only be allowed as to matters in existence before the decision, whereas previously further evidence as to post-decision matters was allowed, and as of right too.*

[82] *The changes brought about by para (3A) have not been made to s 69. Since para (3A) seeks to cling to r 7, and since r 7 has no existence, life or force of its own, but is merely an echo of s 69, r (3A) is nothing more but an attempt by subsidiary legislation to modify s 69. The attempt is ultra vires because subsidiary legislation is not capable of modifying an Act of Parliament, except by express authority of Parliament, which did not exist here.*

[83] *I was of the view, therefore, that s 69 is not affected by para (3A) and further evidence as to post-decision matters may still be given, and as of right. Therefore, merely as a formality to dispel any doubt, leave should be given to the appellants to give the further evidence that they sought to give. The question of its weight and effect would be matters to be considered in the appeal itself.* (Emphasis added.)

[25] In our view, leave of CA is not required for subsequent evidence because the secondpart of s 69(2) of the CJA ('second part (s 69(2) of the CJA)') and the second part of r 7(2) of the RCA ('second part (r 7(2) of the RCA)') have expressly allowed subsequent evidence to be used in the hearing of appeals without any leave of CA. In this regard:

(1) the majority judgment (*Sin Heap Lee-Marubeni*) had dismissed the application for leave of CA to adduce 'further evidence' on the ground that the application was based on an 'assumption' andthere was no 'further evidence' to be adduced at the hearing of the appeal in that case. Furthermore, the majority judgment (*Sin Heap Lee-Marubeni*) did not

discuss the second part (s 69(2) of the CJA) and second part (r 7(2) of the RCA); and

(2) we take the opportunity to approve the dissenting judgment (*Sin Heap Lee-Marubeni*) which can be supported by the following reasons:

(a) according to s 2(1)(e) of the Interpretation Acts 1948 and 1967 ('the IA'), Part I of the IA applies to the RCA because the RCA are made after 31 December 1968 pursuant to the CJA which has been revised under the Revision of Laws Act 1968. Section 23(1) of the IA (in Part I of the IA) provides for the doctrine of ultra vires as follows:

> *Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency*. (Emphasis added.)

The application of s 23(1) of the IA has been explained by Mohd Zawawi Salleh FCJ in the Federal Court (FC) case of *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141; [2020] 1 CLJ 1, at [81], as follows:

> [81] It is trite that subsidiary or delegated legislation shall not be broader than the enabling legislation. This general principle of statutory interpretation is codified in s 23 of the IA ... (Emphasis added.)

(b) RCA are made under s 17 of the CJA. If r 7(3A) of the RCA applies to subsequent evidence, this means r 7(3A) of the RCA is inconsistent with the second part (s 69(2) of the CJA) and by virtue of s 23(1) of the IA, r 7(3A) of the RCA is void to the extent of such an inconsistency.

[26] As explained in the above para 25, by reason of the second part (s 69(2) of the CJA) and second part (r 7(2) of the RCA), the plaintiffs do not require leave of the CA to use Dr Selahuddeen's affidavit in these three appeals.

F. SHOULD CA GRANT LEAVE FOR PLAINTIFFS TO USE DR SELAHUDDEEN'S AFFIDAVIT IN THREE APPEALS?

[27] Notwithstanding our opinion in the above para 25, we are of the view that the plaintiffs have satisfied the two conditions (r 7(3A)) as follows:

(1) the first alternative limb (first condition) is fulfilled because Dr Selahuddeen's affidavit was not available to the plaintiffs during the hearing of the defendants' three striking out applications; and

(2) as explained in para 35 below, the contents of Dr Selahuddeen's affidavit would have been likely to have a determining influence on the three HC decisions. In other words, the second alternative limb (second condition) has been satisfied by the plaintiffs.

Premised on the above reasons, the plaintiffs' three leave applications (Dr Selahuddeen's affidavit) are allowed by this court without any order as to costs.

G. WHETHER COURT CAN APPLY EQUITABLE ESTOPPEL DOCTRINE WITH REGARD TO THREE YEAR LIMITATION PERIOD

[28] The three year limitation period is provided in s 2(a) of the PAPA which reads as follows:

> 2. *Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect*:
>
> (a) *the suit, action*, prosecution *or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or*, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof. (Emphasis added.)

[29] In *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202, Edgar Joseph Jr J (as he then was) has explained in the HC that a defendant may be estopped from relying on a limitation defence provided by the Limitation Act 1953 ('the LA'). It is decided in *Alfred Templeton*, at pp 244–245, as follows:

> I must lastly consider whether one can estop oneself out of the Limitation Act ...
>
> ...
>
> In *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993; [1964] MLJ 49, *a decision of the Privy Council from the then Federal Court of Malaysia, in a case of moneylenders, their Lordships said*:
>
> > *... there are statutes which, though declaring transactions to be unenforceable or void, are nevertheless not absolutely prohibitory and so do not preclude estoppels. One example of this is the Statute of Frauds* (see *Humphries v Humphries* (1910) 2 KB 531 CA *in which it was no doubt considered that ... the statute ought to be treated as regulating procedure, not as striking at essential validity) ... a more direct test to apply ... is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interest of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise*.

These words are widely drawn and suggest that the Limitation Act can give way to estoppel. Indeed, there are dicta in Turberville v West Ham Corporation [1950] 2 KB 208 *which suggest that a defendant will not be heard to rely on a statute of limitation if his acts or statements during the currency of the period have induced the plaintiff to delay proceedings.*

And, in Othman & Anor v Mek [1972] 2 MLJ 158, *Ong CJ said*:

> *... Statutes of limitation which bar the enforcement of a right by action are rules of procedure only: see 24 Halsbury's Laws of England(3rd Ed) p 181. A right which becomes unenforceable merely by reason of limitation does not ipso facto perish or vanish into thin air: see Holmes v Cowcher* [1970] 1 WLR 835 *where it was held that although under s 18(5) of the Limitation Act 1939, arrears of mortgage interest outstanding for more than six years are irrecoverable by action, the mortgagors were only entitled to the equitable remedy of redemption provided that they paid all arrears of mortgage interest, whether statute-barred or not. If, as in that case, equitable rights did not perish by reason of limitation, can this same defence be set up here to deny the rights of a beneficial owner to be granted his claim to the legal title?*

So far as may be necessary, I would hold that based on these dicta the Limitation Act is purely procedural: see Othman and Anor v Mek [1972] 2 MLJ 158 and of *Michell v Harris Engineering Co Ltd* [1967] 2 QB 703 *(CA). And, therefore, in certain circumstances, one can estop oneself out of the Limitation Act by conduct*. (Emphasis added.)

[30] The above decision in Alfred Templeton has been approved by the FC in the following judgment delivered by Gopal Sri Ram JCA (as he then was) in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 344; [1995] 4 CLJ 283 at p 294:

> *Edgar Joseph Jr J (as he then was) in an illuminating judgment in Templeton v Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202, *244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the [LA]*. (Emphasis added.)

[31] The phrase 'any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority' in s 2(a) of the PAPA refers to any person who performs a written law, public duty and/or public authority. For ease of convenience, in this judgment we will describe the person envisaged in s 2(a) of the PAPA as a 'public officer'.

[32] We are unable to find any previous Malaysian case which has decided on the application of the doctrine of equitable estoppel to a public officer who has relied on the three year limitation period in s 2(a) of the PAPA.

[33] It is our view that:

(1) a public officer (X); and

(2) the Federal Government, State Government or public authority (Government/public authority) who is vicariously liable for X's act, omission and/or conduct,

may be estopped by any statement and/or conduct by:

(a) X;

(b) a public officer other than X (Y); and/or

(c) Government/public authority,

from relying on the three year limitation period.

The above decision is supported by the following reasons:

(i) the three year limitation period is a procedural defence and not a substantive one. There may be a statement and/or conduct by X, Y and/or Government/public authority which makes it inequitable for X and/or Government/public authority to rely on the three year limitation period;

(ii) *Alfred Templeton* and *Boustead Trading* have recognised the application of the doctrine of equitable estoppel to bar a party's reliance on a limitation defence pursuant to LA. There is no reason in principle and policy why equitable estoppel doctrine cannot be invoked against public officers and/or Government/public authority in respect of the three year limitation period; and

(iii) in accordance with good public governance, public officers and Government/public authority should not make statements and/or conduct themselves in a manner which may cause any person to be irreparably prejudiced.

H. WAS THERE A TRIABLE ISSUE THAT DEFENDANTS WERE ESTOPPED BY STATEMENTS (DR SELAHUDDEEN/DR AMAN) FROM RELYING ON THREE YEAR LIMITATION PERIOD?

[34] In these three suits, there is a triable issue regarding whether the defendants are estopped by statements (Dr Selahuddeen/Dr Aman) from relying on the three year limitation period (triable issue).

[35] The triable issue is supported by the following evidence and reasons:

(1) the IIC was formed by MOH and was headed by a retired JCA. The plaintiffs knew of the formation of IIC and its inquiry;

(2) at the material time, Dr Selahuddeen and Dr Aman were the Johore State Health Director and hospital's Director respectively. In other words, Dr Selahuddeen and Dr Aman held high office in MOH at the time of the making of the statements (Dr Selahuddeen/Dr Aman);

(3) the statements (Dr Selahuddeen/Dr Aman) were made to the family members (six deceased persons) at the meetings. Minutes (meetings) had been prepared by MOH. It is therefore clear that the statements (Dr Selahuddeen/Dr Aman) were made in the course of the employment of Dr Selahuddeen and Dr Aman. The statements (Dr Selahuddeen/Dr Aman) were not made off-the-cuff without any intention by the defendants to be bound by the statements (Dr Selahuddeen/Dr Aman); and

(4) any reasonable claimant in the position of the plaintiffs who had been informed of the statements (Dr Selahuddeen/Dr Aman), would be lulled into a false of complacency to file a suit after the preparation of the IIC's report andafter the lapse of the three year limitation period. In other words, the plaintiffs did not file the three suits within the three year limitation period because the plaintiffs had relied on the statements (Dr Selahuddeen/Dr Aman). In this sense, it is arguable that the defendants are estopped by the statements (Dr Selahuddeen/Dr Aman) from relying on the three year limitation period to support the defendants' three striking out applications. Consequently, the contents of Dr Selahuddeen's affidavit would have been likely to have a 'determining influence' on the three HC decisions within the meaning of the second alternative limb (second condition).

[36] In view of the triable issue:

(1) it is not a plain and obvious case for the HC to strike out the three suits: please refer to the judgment of the Supreme Court delivered by Mohd Dzaiddin SCJ (as he then was) in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, at 43;

(2) the three suits are neither frivolous nor vexatious within the meaning of O 18 r 19(1)(b) of the RC; and

(3) the three suits do not constitute abuses of court process as understood in O 18 r 19(1)(d) and O 92 r 4 of the RC.

It is to be borne in mind that even if a pleaded claim is weak and is not likely to succeed, this is not a ground in itself to strike out the claim: *Bandar Builder Sdn Bhd*, at p 44. In any event, the triable issue can only be resolved at a trial and not by way of affidavit evidence.

A I. SHOULD PLAINTIFFS BE ALLOWED TO AMEND THEIR STATEMENTS OF CLAIM (SOCs)?

[37] O 1A, O 2 r 1(2) and O 18 r 19(1) of the RC provide as follows:

B O 1A *In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules*.

O 2 r 1 (2) *These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court* C *to achieve this overriding objective*.

O 18 r 19(1) *The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —*

D (a) *it discloses no reasonable cause of action or defence*, as the case may be;

(b) *it is scandalous, frivolous or vexatious*;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) *it is otherwise an abuse of the process of the Court*,

E *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be*. (Emphasis added.)

[38] It is decided by the HC in *Yap Chee Keong Holdings Sdn Bhd* F *v Cosmopolitan Avenue Sdn Bhd* [2022] MLJU 139; [2022] 3 CLJ 764, at [68], that the court has the following five discretionary powers under O 18 r 19(1) RC:

[68] ... *The court has the following five discretionary powers pursuant to O 18 r 19(1) of the RC*:

G (1) the court may strike out a pleading, endorsement on a pleading, an action or counterclaim;

(2) *the court may allow a party to amend a pleading, endorsement on a pleading, action* or counterclaim;

H (3) the court may stay an action or counterclaim;

(4) the court may dismiss an action or counterclaim; or

(5) the court may enter a judgment in an action or counterclaim. (Emphasis added.)

I **[39]** In accordance with O 1A and O 2 r 1(2) of the RC, HC's discretionary powers pursuant to O 18 r 19(1) of the RC should be exercised with regard to the overriding interest of justice. In the disposal of the three appeals, by virtue of s 69(1) of the CJA, the CA has all the powers of the HC.

[40] In view of the statements (Dr Selahuddeen/Dr Aman) and the triable issue, it is only just for this court to grant leave under O 18 r 19(1) of the RC read with O 1A and O 2 r 1(2) of the RC for the plaintiffs to amend the SOCs so as to include a pleading that the defendants are estopped by the statements (Dr Selahuddeen/Dr Aman) from relying on the three year limitation period (estoppel pleading). No injustice is occasioned to the defendants by allowing the plaintiffs to amend the SOCs because:

(1) the defendants are entitled to amend their defence in the three suits with regard to the estoppel pleading; and

(2) irrespective of the estoppel pleading, the defendants are at liberty to defend themselves at the trial of the three suits as they see fit.

J. CONCLUSION

[41] Premised on the above reasons and Dr Selahuddeen's affidavit, the three appeals are allowed with the following order:

(1) the three HC's decisions are set aside;

(2) the three suits are remitted to the HC to be tried before another judge or JC;

(3) leave is granted to the three plaintiffs to amend their SOCs to include the estoppel pleading within 14 days from the date of the order of this court (with leave to the defendants to amend their defence in the three suits in response to the amended SOCs); and

(4) costs of the three appeals and defendants' three striking out applications shall follow the event of the trial of the three suits.

Appeals allowed.

Reported by Dzulqarnain Ab Fatar